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MICHAEL RODAK, JR., CLERK

IN THE  
Supreme Court of the United States  
October Term, 1976

No. 76-1859

SALVATORE LARCA,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

PETITIONER LARCA'S REPLY BRIEF

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**PETITIONER LARCA'S REPLY BRIEF**

In our Petition, we urged that the conduct of the trial court in striking a critically important defense exhibit (e.g., the methadone maintenance records which demonstrated that the Government's witness-in-chief had perjured himself) and thereafter precluding the defense from calling the necessary witnesses to demonstrate the reliability of those records, deprived the petitioner of his constitutional rights to have compulsory process for obtaining witness; to have the assistance of counsel for his defense and deprived him of the right to confront the witnesses against him.

In its brief in opposition the Government urges that the Court was within its discretion in excluding the exhibits after finding them unreliable. In any event, argues the Government, the trial court's error, if any, was harmless. The government's conclusions are totally untenable inasmuch as they are based upon an unsupported

and erroneous view of the facts. The Government's brief is at best misleading from its opening characterization of the disputed hospital records as expurgated xerophic copies to its mistaken belief that the records would only impeach Boriello as to his April trip to Thailand.

Although the methodone clinic's records (DX V) were "redacted", they were so submitted without objection by the Government and to protect the names of the other patients at the clinic. Contrary to the Government's present position there was no "apparent understanding" that the records would later be authenticated.

The Government urges that at trial petitioner made no objection to the *ex parte* procedure adopted by the judge. The Government is clearly mistaken. The procedure used by the trial court was presented to trial counsel as a *fait accompli*. They were not given an opportunity to object.

The Government further premises its conclusion that the Court correctly struck the hospital records, on the assumption that defense counsel had an opportunity to examine certain officials of the methodone clinic. This is a rather disingenuous view of the facts. While it is true that an informal conference did occur, the following colloquy took place when the defense sought to establish the reliability of the proffered documents:

THE COURT: I put it on the record so that you could do what you want to. The records to me aren't reliable and they aren't going to be used.

COUNSEL FOR LARCA: May I ask the person who kept the record be brought in and state—that is, that the, if you will, amanuensis be brought in to establish the reliability of the records.

THE COURT: I'm not going to delay the trial . . ." (A. 165-166).

In short, no direct or cross-examination under oath occurred which would have established or negatived the trustworthiness of the proffered documents. This is not the stuff upon which our system of advocacy is based.

Consequently, the Government's conclusion that the trial court acted within its discretion in excluding the documents as not trustworthy is incorrect because it is based on the notion that "the *testimony* of the clinic official established that these records were not reliable . . ." *There was no such testimony.* The Court, therefore, had no sworn or affirmed facts upon which to make a reasoned decision. On the contrary, the Court's threshold decision, (which we now know was factually incorrect) was based upon unsworn hearsay allegations. cf. *United States v. Robinson*, 544 F.2d 1101-1115 (2nd Cir., 1976) and *United States v. DeGeorgia*, 420 F.2d 889, 893 (9th Cir., 1969).<sup>\*</sup> The underlying theme of the government's brief (see e.g., p. 6) is that somehow the management of the proper introduction of this critically important document was for the defense. We submit that in view of the court's initial decision to admit the documents followed by its summary decision to strike them, it was the Court's responsibility to properly manage the admission or non-admission of the questioned documents by granting the defense an opportunity to lay a proper foundation.

Finally, the Government falls back upon the sometimes abused doctrine of harmless error. They urge that since the hospital records attacked their informant's credibility as to his April trip, his testimony with respect

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<sup>\*</sup> The Government's assertion that the clinic's post-verdict letter is secondary material is simply untrue. On the contrary, a reading of those documents reveals that they are primary source documents which demonstrate beyond peradventure, Boriello's presence at the clinic in April 1976.

to his subsequent sojourns remained intact. This position cannot be supported. *Clear and patent perjury committed by the prosecution's witness-in-chief should never be condoned as harmless.* Moreover, if the jury disbelieved Boriello's narrative as to his April trip, it may well have disbelieved his entire narrative inasmuch as the April trip and his subsequent return to the Far East were inexorably bound as are a row of dominoes.

We respectfully submit that the Court's refusal to permit counsel to call the witnesses he believed necessary to demonstrate the correct quantum of trustworthiness was not only an evidentiary error of great magnitude, but rose to the level of depriving the defendant of his constitutional rights to have compulsory process for obtaining witnesses in his favor, to have the assistance of counsel for his defense, and most important, the right to confront the witnesses against him—here the two witnesses from the clinic.

Respectfully submitted,

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